IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

JAYANT EXTRACTION INDUSTRIES PVT LTD

Versus

SALES TAX OFFICER

Appearance:
1. Special Civil Application No. 12 of 1987
MR TANVISH BHATT for MR RD PATHAK for Petitioner No. 1
MR UR BHATT, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 09/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

The petitioners in this petition under Article 226 of the Constitution of India, challenged three different sets of orders produced at Annexures A/1, A/2

(Colly) and A/3 (Colly). Order at Annexure A/1 was passed under section 42(1) of the Gujarat Sales Tax Act, 1969 by the Deputy Commissioner of Sales-tax, Rajkot, the respondent no.3 herein, on 7-11-1985 extending the time limit to complete the assessment of the petitioners for the period from 1-1-1980 to Aso Vad Amas, 2036, 2037 and Kartik Sud 1, S.Y. 2038 to 29-4-82 upto Aso Vad Amas of S.Y. 2042. Orders at Annexure A/2 are Draft Assessment Orders passed by the Sales-tax Officer (2), Division -2, Jamnagar , respondent No.1 herein, under section 46 A of the Act on 30-4-1983 for the first two years and on 2-6-1983 for the third year. Annexure A/3 are the Final Assessment Orders passed by the Assistant Commissioner of Sales-tax, Bhavnagar, respondent No.2, on 30-9-1986 for all the three assessment years.

2. It is the say of the petitioners that the reason given in the order at Annexure A/1 for staying the assessment proceedings for the above periods, was absolutely incorrect as the verification of the account books of the petitioner and the relevant inquiries thereto were already completed prior to 30-4-1983 and/or 2-6-1983, by which dates respondent No.1 had already passed the Draft orders of assessment against the petitioners in relation to the above periods. While passing the Draft Assessment Orders at Annexure A/2, respondent No.1 had proposed to levy purchase tax under section 16 of the Act as was leviable as the account books and registers produced by the petitioners before him showing the disposal of the goods purchased against declaration Form No.9 in the manufacture of goods sold in the State on the one hand and sold outside the State on the other hand. Respondent No.1 had also levied penalty under section 45(1)(a) of the Act and charged interest under section 47(4A) of the Act. It is the further say of the petitioners that even though they had paid the tax due as per the returns submitted by them before respondent No.1, respondent No.2, in addition to the various penalties levied, had also charged interest under section 47(4A) of the Act and enhanced the quantum of purchase tax levied by respond----------

of the Act. The final assessments as framed by respondent NO.2 were resulted into raising of following demands against the petitioners under different heads.

Period of assessment	Ann. No.	Penalty u/s.45(1) (a)	Penalty u/s. 45(6)	Interest u/s.47(4A)	Purchase Tax u/s.16	Purchase Tax u/s.16 proposed to be

		levied by respondent No.1 (Rs.)	(Rs.)	(Rs.)	(Rs.)	(Rs.)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1-1-80 to 2036 Aso	A/3(1)	1,44,840/-	-	-	5,84,957-36	4,52,966-00
Vad Amas S.Y. 2037	A/3(2)	1,04,854/-	85,012	2,40,720-88	5,29,417-76	96,093-80
S.Y.2038	A/3(3)	6,069/-	18,91----------			

Kartik Sud
1 to
29-4-82

3. The petitioners have strongly urged before this Court that the orders at Annexures A/2 and A/3 passed by respondents No.1 and 2 respectively and the order at Annexure A/1 passed by respondent No.3 and Section 47(4A) of the Act, are apparently ultra-vires the Constitution and are also illegal and liable to be quashed and set aside and struck down as the case may be. The prayer, regarding vires of the provisions of Section 47(4A) of the Act was earlier withdrawn by the petitioners and hence the said prayer is not now dealt with in this judgment.

4. In support of the above referred contentions, the petitioners have extensively quoted the relevant provisions of the Act, highlighted the salient facts of their case and relied on the judicial pronouncements of the Supreme Court as well as of this Court. Section 42 of the Act prescribes the time limit for completion of assessment and the same as in force upto 5th December, 1985 is as under:-

"42(1)(a) No order of assessment for a year or part of a year shall be made under sub-section (3) or (4) of section 41 at any time after the expiry of two years from the end of the year in which the last monthly, quarterly or, as the case may be, annual return is filed.

(b) Where the Commissioner issues a notice under sub-section (6) of section 41, to

any dealer for assessment of tax in respect of any period, no order of assessment shall be made for such part of the period, if any, as is prior to -

(i) a period of eight years ending on the last date of the year immediately preceding the year in which such notice is issued, in a case where the Commissioner has reason to believe that such dealer has failed to apply for registration with intention to defraud Government revenue; and

(ii) a period of four years ending on the last date as aforesaid, in any other case :

Provided that for the purpose of this section if it is considered necessary so to do, the State Government may, subject to such conditions as it may deem fit, and the Commissioner may, subject to such conditions as may be prescribed by a general or special orders, stay, either generally for a specified period, the assessment proceedings of a dealer or class of dealers;

Provided also that in computing the period of limitation for the purposes of this section, any period any period during which assessment proceedings are stayed under the first proviso or by an order or injunction of any Court or authority shall be excluded."

Provided further that where a fresh assessment is required to be made in pursuance of any order under section 65, 67 or 69 or in pursuance of any order of any court or authority, such fresh assessment shall be made at any time within three years from the date of such order :

(2) Nothing in sub-section (1) shall apply to any assessment proceedings (including any notice issued)

pending immediately before the appointed day"

From 6th December, 1985 (Vide 61 STC 58 - Statute Section), the Gujarat Sales Tax (Amendment) Act, 1986 (hereinafter referred to as "the Amendment Act" was enacted by the Legislature inserting after clause (a) of sub-section (1) of section 42, the following clause (aa) which is as under:

"(aa) Notwithstanding the expiry of the period specified in clause (a),an order of assessment for S.Y. 2038, calendar year 1982 or, as the case may be, financial year ending on 31st March, 1983, or part of any such year may be made under sub-section (3) or (4) of section 41 at any time not later than the end of samvat year 2042, calendar year 1986 or as the case may be, financial year ending on 31st March, 1987."

The Amendment Act replaced the Gujarat Sales Tax (Amendment) Ordinance 1985, promulgated on 6th December, 1985.

The Statement of Objects and Reasons appended to the Amendment Act (Gujarat Bill No.3 of 1986) runs as follows:

"Clause (a) of sub-section (1) of section 42 of the Gujarat Sales Tax Act, 1969, prohibits making of an order of assessment for a year after the expiry of two years from the end of year in which the last monthly, quarterly or, as the case may be, annual return is filed. On account of disturbance in certain parts of the State by reason or riot or violence of mob during certain part of the year 1985 as well as on account of strike resorted by certain employees in the Sales Tax Department in that year, the work of assessment of tax could not be completed before the specified period as contemplated by the said clause (a). It was, therefore, considered necessary to amend the said section 42 with a view to taking power to complete the work of assessment not so completed.

As the Gujarat Legislative Assembly was not in session, the Gujarat Sales Tax (Amendment) Ordinance, 1985 (Guj.Ord.20 of 1985), was promulgated to achieve the aforesaid object. This Bill seeks to replace the said Ordinance by

an Act of the State Legislature."

5. The provisions dealing with cases where a draft order is required to be prepared, objections are to be invited against such draft order and if received, they are to be transmitted to the higher authority contained under Section 46-A as operative at the relevant time, read as under:-

46A: DEALERS TO BE HEARD IN CERTAIN CASES.

(1) Where any Sales Tax Authority mentioned in section 27 exercising the powers under section 41 proposes to make an order of assessment under that section and, such order if made, would in the opinion of such authority, impose on a dealer a liability to pay an amount not less than Rs.25,000/- by way of tax in respect of a period in addition to the amount of tax indicated by the dealer in his declaration or return in respect of that period such authority shall serve in such manner as may be prescribed on such a dealer a draft order and invite his objections in relation to it.

(2) Where any Sales Tax Authority mentioned in section 27 exercising the powers under section 44, 45 or 46 proposes to make an order of reassessment under section 44 or an order imposing a penalty under section 45 or 46 and such order if made, would in the opinion of such authority, impose on a dealer a liability to pay an amount not less than Rs.25,000/- by way of tax or an amount not less than Rs.7500/- by way of penalty in respect of a period in addition to the amount of tax assessed or penalty imposed in respect of that period, such authority shall serve in such manner and as may be prescribed on such dealer a draft order and invite his objections in relation to it.

"(3) Where the dealer to whom the draft order is served under sub-section (1) or (2) communicates in writing to the authority his objections in relation to the draft order within a period of thirty days from the date of service of the draft order, the authority shall transfer the proceedings to such other Sales Tax Authority to which an appeal against the order would have lied under section 65, and thereupon the other authority to which the proceedings have been

transferred shall exercise the powers under section 41, 44, 45 or as the case may be, 46 in relation to those proceedings;

Provided that nothing in section 82 shall apply to any transfer of proceedings made under this sub-section."

(4) Where the dealer to whom the draft order is served under sub-section (1) or (2) fails to communicate in writing to the authority his objections in relation to the draft order within a period of thirty days from the date of service of the draft order, the authority shall make an order of assessment or, as the case may be, an order imposing penalty under section 41, 44, 45 or as the case may be, 46 in accordance with the draft order."

6. Rule 37A prescribes the conditions subject to which the Commissioner may grant stay and the same is as under:-

"37A - Conditions subject to which Commissioner may grant stay -

Conditions subject to which the Commissioner may, under the first proviso to sub-section (1) of Section 42, stay the assessment proceedings of a dealer or a class of dealers, shall be as follows, namely:-

(1) no assessment proceedings shall be stayed by the Commissioner for a period of more than five years at any time -

(2) the Commissioner shall reduce in writing the reasons and circumstances necessitating stay of any proceedings in respect of a dealer or a class of dealer."

7. A plea was raised by the petitioners in the petition that Section 42 of the Act has been enacted only with a view to avoid delayed assessments by the assessing authorities to the detriment of assesses so much so that from 1-4-1979 by section 7 of the Gujarat Sales Tax (Amendment) Act, 1979, Section 42(1)(a) of the Act was amended so as to reduce the time limit of completion of assessments from three years to two years. The petitioners, therefore, submitted that the stay of assessments could have only been made on valid grounds.

AS discussed above, according to the petitioners, there was no valid ground for stay of assessments as more time was required for inquiry, but the assessing officer had already completed the inquiries and verified the books of accounts of the petitioners prior to 2-6-1983, by which date he had already passed the draft orders of assessment against the petitioners in relation to these periods.

8. The petitioners have, alternatively, contended that if it be held that the final orders of assessment at Annexure A/3 are not barred by limitation under Section 42 of the Act, the said orders are certainly illegal and without jurisdiction being in contravention of the order at Annexure A/1 staying the assessment proceedings of the petitioners covered under Annexure A/3 upto 2-11-1986. The petitioners, therefore, relying on the principles laid down by this Court in the case of Baroda Board and Paper Mills Ltd. vs. ITO, 37 STC 339 and of the Andhra Pradesh High Court in the case of Laxminarayan vs/ CTO 33 STC 558, claimed the refund of Rs.40,38,992/- paid by the petitioners alongwith the returns submitted by them for the periods covered under orders at Annexure A/3.

9. The jurisdiction of the authorities was challenged in this petition and on notice being issued by this Court, the respondents have filed their appearance and thereafter the petition was admitted and the affidavit in reply was filed as late as on 6.4.2002. With regard to the period of limitation, it is contended in para 4 of the affidavit in reply that the assessments as framed by the respondents were in accordance with the provisions contained in Section 46A of the Act and that the reliance placed by the petitioners on the provisions contained in Section 42 of the Act is misconceived. It was further contended in the reply affidavit that the draft assessment orders for all the concerned years were passed by the appropriate authority and served them upon the petitioners who in turn filed objections to the same and that as a result of the same, as per the statute, the matter was referred to the Assistant Commissioner of Sales-tax and thus, Section 46-A came into operation. It was further stated in the affidavit in reply that if the dealer, within the prescribed time limit, objects to the draft assessment order, the operation of Section 46A starts and accordingly the Assistant Commissioner (Appeals) starts to exercise his jurisdiction conferred under Section 46A and thus the earlier exercise of jurisdiction by the Sales-tax Officer/appropriate authority would not be of any consequence in view of the operation of the statute, inter alia, Section 46A of the Act. Thus, in view of Section 46A coming into operation,

the question of time barred assessment, limitation etc. would not arise in any manner whatsoever and having based on these submissions, it was stated that the petition is required to be dismissed as it does not survive.

10. Heard Mr Tanvish Bhatt, the learned advocate appearing for the petitioners and Mr UR Bhatt, the learned Assistant Government Pleader appearing for the respondents.

11. It may be noted from the provisions contained in Section 42 of the Act, as quoted hereinabove, that the time limit prescribed for completion of an assessment was, at the relevant time, two years from the end of the year in which the last monthly/quarterly, or as the case may be, annual return is filed. In view of this provision, the learned counsel for the petitioners, Shri Tanvish Bhatt submitted that as far as S.Y. 2036 covering the period from 1-1-1980 to 7-11-1980 is concerned, the due date for completion of assessment was 4-11-1983. Similarly, for S.Y. 2037 commencing the period from 8-11-1980 to 27-10-1981, the due date for completion of assessment was 24-10-1984. In the same way, for S.Y. 2038, covering the period from 28-10-1981 to 29-4-1982, the due date for completion of assessment was 12-11-1985. In order to avail of the benefit of exclusion under the second proviso to section 42(1) of the Act, the assessment proceedings are required to be stayed before the expiry of the period of limitation. Any order made after the period of expiry of limitation staying the assessment proceedings cannot relate back to revitalise the proceedings. In the case on hands, for S.Y. 2036 and 2037, the due date for completion of assessment was 4-11-1983 and 24-10-1984 respectively and the order of staying the assessments for S.Y. 2036; and 2037 till S.Y. 2042 was passed by respondent No.3 on 7-11-1985 i.e. much after the period of limitation expired. We are, therefore, of the view that no assessment order under Section 41(3) or (4) of the Act could have been made after 4-11-1983 and 24-10-1984 respectively and the subsequent stay of the proceedings was of no avail for extending the period of limitation in respect of these two years beyond 4-11-1983 and 24-10-1984 respectively. The impugned orders of assessment made in respect of S.Y. 2036 and 2037 beyond the period of limitation are, therefore, without jurisdiction and void. As far as S.Y. 2038 is concerned, the due date for completion of assessment was 12-11-1985 and order of staying the assessment till S.Y. 2042 was passed by respondent No.3 on 7-11-1985 i.e. before the period of limitation expired. We are,

therefore, of the view that so far as S.Y. 2038 is concerned, in computing the period of limitation for the purpose of Section 42(1) of the Act, the period during which the assessment proceedings were so stayed under the first proviso, was required to be excluded as provided by the second proviso, and therefore, the assessment order in respect of S.Y. 2038 was not barred by limitation.

12. The contention of the learned Assistant Government Pleader Shri UR Bhatt that for the purposes of an order to be made by the higher authority to which a draft order along with the objections is transmitted under Section 46A of the Act, the limitation should be computed from the date of service of the draft order finds no support from any statutory provision. There is no ambiguity in the provisions contained in Section 46A of the Act which even remotely suggests that the period of limitation prescribed for completion of assessment under Section 42 of the Act is extended by virtue of the provisions contained in Section 46A(3) of the Act. This sub-section only states that once the proceedings were transferred, the authority to whom such proceedings were transferred, shall exercise the power under Sections 41,44, 45 or as the case may be 46 in relation to those proceedings. We, therefore, reject the contention of the learned Assistant Government Pleader that by virtue of the provisions contained in Section 46A of the Act, the extended date for completion of the assessments for the respective years was 2-1-1986 and since the assessments were framed within that period, the assessments were not barred by limitation.

13. The second contention raised by the learned advocate appearing for the petitioners was that there was no extraordinary circumstance or supervening reason which prompts respondent No.3 to pass an order staying the assessment proceedings for all the three years in question till S.Y. 2042 as the only reason given was that the inquiry was in process an some more time was required. It is a settled legal position that the power of the State Government or the Commissioner under Section 42 (1) of the said Act to stay the assessment proceedings can be exercised only in extraordinary circumstances and for supervening reasons which cannot be attributed to the default or failure of the assessing authorities. The Supreme Court in Fag Precision Bearings vs. Sales Tax Officer (1997) 104 STC 143, while dealing with a stay order passed under the first proviso to subsection (1) of Section 42 of the Act, read with Rule 37-A of the Rules, observed as under:-

"In order to avail of the benefit of exclusion under the second proviso to Section 42(1), the assessment proceedings must be stayed before the expiry of the period of limitation. Any order made after the period of expiry of limitation staying the assessment proceedings cannot relate back to revitalize the proceedings. At the expiry of the period of three years from the dates stipulated in section 42(1)(a), the authority to make an assessment order ends. All the provisos of Section 42(1) are made applicable mutatis mutandis to the reassessment proceedings under Section 44 of the Act as provided therein. It would, therefore, follow that even in cases where the reassessment order is not made within three years from the date of service of the notice being the time-limit prescribed by section 44(b), no order can be made thereafter unless the proceedings are stayed while they are alive and during the period when an order could have been made by the concerned authority.

The provisions of section 46-A(2) which deal with reassessment proceedings contemplate that it is the sales tax authority exercising powers under section 44, 45 or 46, that proposes to make an order of reassessment which in its opinion imposes a liability of an amount higher than the specified amount and prepares and serves a draft order on the dealer inviting his objections. This stage comes clearly after the initiation of the proceedings for reassessment under section 44, which is done by serving a requisite notice on the dealer. The stage of preparation of a draft order in reassessment proceedings is a stage subsequent to service of such notice. The date of service of notice fixed the starting point of limitation for making the reassessment order, which can be made, in cases where the liability exceeds the amounts stipulated in sub-section (2) of section 46-A even by the authority making the draft order, if no objections are received against the draft order, as contemplated by sub-section (4) of section 46-A. In cases where objections are received, the stipulated higher authority would make such orders after the proceedings are transmitted to it under sub-section (3) of section 46-A. There is therefore, no scope for varying the starting point of limitation, which

commences in all cases of reassessment, from the date of the service of notice on the dealer as provided by section 44(b) of the Act. The contention that the period should be computed from the date of service of the draft order is not warranted by any of these provisions."

14. Similar view was taken by this Court in the case of Gujarat Steel Tubes Ltd. vs. Sales Tax Officer (1998) 110 STC 401 and Javer Jivan Mehta vs. Asstt. Commissioner of Sales Tax (1998) 111 STC 199.

15. In the case before us, it is not disputed that in the stay order dated 7-11-1985, there was no ground set out except that inquiry was in process and some more time was required for making the assessment orders. However, draft orders for all the three years were passed much earlier. AS held by the Supreme Court, such a ground was not a good ground and would not in our view amount to any reason contemplated by Rule 37A of the Rules. If such a ground is accepted it would defeat the very purpose of providing the time limit for making the assessment/ reassessment orders. The impugned order of stay dated 7-11-1985, therefore, cannot be sustained, and consequently, the period covered by second proviso to Section 42(1) of the Act for computing the limitation period in respect of assessment orders for S.Y. 2036, 2037 and 2038.

16. In view of the above discussion, the order passed by respondent No.3 on 7-11-1985 staying the assessment proceedings for S.Y. 2036, 2037 and 2038 and the final order passed by respondent No.2 on 30-9-1986 for all the three assessment years are quashed and set aside. We, however, make it clear that as far as the challenge to the vires of the provisions contained in Section 47(4) of the Act is concerned, as stated earlier, the same has already been withdrawn. Hence, the said prayer cannot be granted in this petition.

So far as the claim for refund of the amount which were paid by the petitioners as per the returns filed is concerned, it is made clear that as far as the admitted liabilities are concerned, and the payments were made by the petitioners as per the return filed by them, the said amounts cannot be refunded to the petitioners. Even otherwise, this was not seriously pressed by the learned advocate appearing for the petitioners.

We also make it clear that the respondents are not empowered to recover any amount demanded by them pursuant to the orders passed by respondent No.2 for S.Y.

2036, 2037 and 2038 as the said orders are already quashed and set aside by us.

Subject to these observations, rule is made absolute to the above extent with no order as to costs.

(M.S. Shah,J) (K.A. Puj,J)

sundar/-